

File



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application by Birchwood Lake Association, Inc.,
for a Permit to Dredge Birchwood Lake in the
Town of Osceola, Fond du Lac County, Wisconsin

Case No.: 3-NE-98-0014

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Birchwood lake Association, Inc., c/o Mr. John Schultz, W828 Birchwood Drive, Campbellsport, WI 53010, applied to the Wisconsin Department of Natural Resources for a permit pursuant to sec. 30.20, Stats., to remove materials from the bed of Birchwood Lake in the SW ¼ of the SW ¼ of Section 26, and the SE ¼ of the SE ¼ of Section 27, Township 14 North, Range 19 East, Fond du Lac County, Wisconsin.

On August 5, 1998, the Department of Natural Resources denied the application and determined that the proposed project would be detrimental to the public interest in Birchwood Lake. On August 31, 1998, the Department received a Petition for Review of the Department's Order pursuant to sec. 227.42, Stats., from Attorney Frank J. Endejan on behalf of Birchwood Lake Association, Inc.. On September 4, 1998, George Meyer, Secretary of the Department of Natural Resources, granted the request for a contested case hearing. The Division of Hearings and Appeals received the Request for Hearing from the Department August 17, 1999.

Pursuant to due notice hearing was held on October 20, 1999, at Fond du Lac, Wisconsin before Jeffrey D. Boldt, administrative law judge (the ALJ). The parties requested an opportunity to submit written closing arguments, and last submittal was received November 17, 1999.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

Birchwood Lake Association, Inc., by

Attorney Frank Endejan
115 South Main Street
Fond du Lac, WI 54935

FINDINGS OF FACT

1. Birchwood Lake Association, Inc. (the applicants or the Association), c/o John Schultz, W828 Birchwood Drive, Campbellsport, Wisconsin, 53010, completed filing an application with the Department for a permit under sec. 30.20, Stats., to remove materials from the bed of Birchwood Lake, Town of Osceola, Fond du Lac County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.20 and 30.02, Stats.

2. The applicants own real property located in the SW ¼ of the SW ¼ in Section 26, Township 14 North, Range 19 East, Fond du Lac County. The above-described property abuts Birchwood Lake (the lake) which is a non-navigable private lake. All riparian land on Birchwood Lake is privately owned and there is no public access to the lake.

3. The applicants propose to dredge approximately 2980 cubic yards at various locations on Birchwood Lake. (Ex. 5) Birchwood Lake consists of approximately 32 surface acres. The lake was created approximately 30 years ago when a non-navigable branch of Lake Fifteen Creek was diverted and a dike constructed.

4. Birchwood Lake has one outlet, located on the south shore; this outlet controls water levels by means of the dike and water control structure. There is no direct connection between Birchwood Lake and Auburn Lake Creek. Navigation on the lake consists primarily of canoe and other small watercraft. The Association restricts boating traffic to watercraft having no more than a 10 horse-power motor.

5. The purpose of the dredging as stated in the application is to improve the free flow of water through the lake for nutrient flushing and to increase water depths sufficiently to allow mechanical weed-cutting. The Association also expressed concerns about boating safety in connection with the proposed dredging. However, the record was clear that the Association could remove floating bog material and tree stumps without a dredging permit and that this would address safety concerns. The applicants have done dredging over several years and have deposited spoils by conveyor to an area in the southeast corner of the lake near outlet 6. (See Ex. 6, p. 23) There is a berm between the spoil deposition area and the lake, which is about 32 feet from the existing spoils placement area. A commercial nursery and some Association members have used some dredge spoils for gardening projects.

6. The outlet of the Birchwood Lake eventually flows into Auburn Lake Creek (the creek) which is very shallow and three to four feet wide at the point of connection. The creek

eventually flows into and out of Auburn Lake. (Ex. 16) Auburn Lake eventually connects with the Milwaukee River. (Exs. 52, 53)

7. The Association currently maintains a fish farming license which gives it effective control over the fishery in Birchwood Lake. There is, accordingly, no direct public interest in maintaining the fishery in the lake because any public rights are subject to the terms and conditions of the fish farming license and former private fish hatchery licensure. However, to the extent that the fishery declines and has secondary impacts on public waters, fishery values are relevant to a consideration of the permit application. (See: Finding #9)

8. There would be a detrimental impact on the public interest if the proposed dredging occurs as proposed. The dredging would be accomplished by use of a small dredge bucket, over the course of five years. This would create a chronic disturbance of sediment. The proposed project would cause a chronic ambient water quality and habitat disturbance within the small lake. It would likely have the same effect as a point source discharge of sediment and nutrients to the water. This would increase the risk for algae blooms, exotic plant species invasions (eurasion milfoil), and general shifts in trophic conditions. (Sesing)

9. DNR Lake Management Specialist Mark Sesing testified at length about the ecological connections between Birchwood Lake and neighboring public waters. Chronic disturbance of sediment has been shown to increase turbidity and decrease light needed for rooted aquatic vegetation. Dredging also directly eliminates seed sources for such plants. Instead, sediment disturbances release phosphorous, facilitating algae blooms. Shallow lake systems which become turbid are more at risk for domination of exotic nuisance plant species such as Eurasian watermilfoil and rough fish species. (Sesing; See Ex. 115) Both exotic nuisance plant species and rough fish can easily make their way into nearby lakes, and thus have a detrimental impact upon the public interest in navigable public waters such as Long Lake and Auburn Lake.

The expert testimony regarding secondary impacts to public waters was not rebutted by the Association. Accordingly, the record is clear that the proposed five-year project would be detrimental to the public interest in navigable waters.

DISCUSSION

Section 30.20(1)(b), Stats., gives the DNR jurisdiction to require a permit for dredging undertaken on non-navigable waterways. Accord: Dwyer v. State, 91 Wis. 2d 440, 443, 283 N.W. 2d 448 (Wis. Ct. Apps. 1979) In the instant matter, the DNR properly sought to require conditions protective of the public interest in a proposed permit which the Association rejected. (Ex. 98) One central dispute was the length of the dredging permit. The Association wanted a 5-year permit, the DNR offered a 2-year permit. The DNR had reasonable concerns about the impact of a chronic disturbance of bottom sediments over a five-year period. Most dredging projects are undertaken with much larger equipment, and accomplished both more efficiently and with shorter-term disturbance to water quality. (Sesing) A five-year permit would allow for too long a period of chronic disturbance to the waters, and extends the period in which secondary

impacts could occur to downstream public waters. The DNR's offer of a two-year permit would be far more reasonable.

However, given the Association's unwillingness to accept even standard, boilerplate conditions to its permit, and given its refusal to limit the dredging to either a smaller area or a shorter time span, the ALJ does not believe it is appropriate to issue a dredging permit along the lines of the proposed permit (Ex. 98) at this time. The current proposal, of dredging a larger area of the lake over many years, has significant risk of environmental damage to both the private waters of Birchwood Lake and to downstream public waters.

The DNR offered un rebutted expert testimony demonstrating that the proposed dredging would likely result in a shift of the ecology of the lake from rooted aquatic plants to algae. This would likely favor rough fish, such as carp and bullhead, and could threaten the public waters of Lake 15 creek, an exceptional resource. (Sesing)

The Association and a DNR employee had a private quarrel which seemed to taint the relationship between the applicants and the Department. The Association membership believed there was some type of conspiracy to restrict the dredging project on its small private lake. Nothing in the record supports the idea of a conspiracy against the Association. However, given these concerns, the Association was unwilling to submit a revised application that would meet the DNR's legitimate concerns about the environmental impacts to both private and public waters as a result of the chronic disturbance of sediment, the disruption of the existing plant ecology, and the proliferation of algae and rough fish. It is hoped that cooler heads within the Association will submit a revised plan that will allow the Association to undertake some dredging without these unnecessary risks to the environment.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and to issue necessary orders in cases involving the removal of materials from the beds of waterways pursuant to secs. 227.43(1)(b) and 30.20, Wis. Stats.

2. The applicant has the burden of proof in an application for a permit under Ch. 30, Stats. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 412 N.W.2d (Wis. Ct. Appt. 1987)

3. Section 30.20(1)(b), Stats., reads, "No person shall remove any material from the bed of any lake or stream not mentioned in par. (a) without first obtaining a permit from the department under sub. (2)(c)." Paragraph (a) refers only to navigable lakes and outlying waters of the state. Therefore, by the plain language of the statute, paragraph (b) must cover non-navigable lakes and navigable and non-navigable streams. Dwyer v. State, 91 Wis. 2d 440, 443, 283 N.W.2d 448 (Wis. Ct. Apps. 1979) Accordingly, the DNR and the Division have authority to require a permit for the proposed dredging.

4. A permit to remove material from the bed of a non-navigable lake or stream may be issued if issuance is consistent with the public interest in the water involved. Sec. 30.20(2)(c), Wis. Stats. The proposed dredging is not consistent with the public interest in Birchwood Lake, nor with the public interest in nearby public waters.

5. The DNR must consider the "cumulative impacts" of many small projects on the public waters of the state. Sterlingworth Condominium Ass'n v. DNR, 205 Wis. 2d 710, 721-22, 556 N.W.2d 791 (Wis. Ct. App. 1996) Citing Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966) There would be detrimental cumulative impacts upon the public waters of the state if the project were approved as proposed.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the permit application be DENIED.

Dated at Madison, Wisconsin on December 6, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 264-9885

By Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.